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No. _____

IN THE SUPREME COURT OF THE

UNITED STATES

October Term 1984-85

GEORGE E. WASHINGTON, JR.,

Petitioner,

VS.

STATE OF ALABAMA,

Respondent.

Petition for a Writ of Certiorari to the Supreme Court and the Court of Criminal Appeals of Alabama

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QUESTIONS PRESENTED

Whether the Petitioner's right to be free from unreasonable searches and seizures under the Fourth Amendment of the United States Constitution, applicable to the States via the Fourteenth Amendment of the United States Constitution, has been violated.

PARTIES

In the Circuit Court of Macon County, Alabama, the Court of Criminal Appeals of Alabama and the Supreme Court of Alabama, the parties were: George E. Washington, Jr., Petitioner herein, and the State of Alabama, Respondent herein.

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TABLE OF CONSTITUTIONAL PROVISIONS AND STATUTORY PROVISIONS

This case involves the Fourth and Fourteenth Amendments to the Constitution of the United States.

OPINION BELOW

The conviction of the Petitioner was affirmed by opinion of the Alabama Court of Criminal Appeals dated October 9, 1984. Application for Rehearing in that court was timely filed which said application was overruled without opinion on November 13, 1984. The Alabama Supreme Court denied a timely Petition for Writ of Certiorari on January 25, 1985, without opinion.

A copy of the opinion and Orders reflecting these actions are attached hereto

as Appendix "A".

JURISDICTION

The judgment of the Supreme Court of Alabama in denying the Writ of Certiorari to the Court of Criminal Appeals of Alabama was entered on January 25, 1985. The effect of this opinion was to exhaust Petitioner's avenues of relief in the highest court of the State of Alabama, and to affirm the opinion of the Court of Criminal Appeals of Alabama.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constituion reads as follows:

"The right of the people to be

secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . ."

The Fourteenth Amendment to the United States Constitution reads as follows:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

The Petitioner, George E. Washington, Jr., was indicted by the Fall 1982 Term of the Macon County, Alabama, Grand Jury for the

crime of violation of The Alabama Uniform Controlled Substances Act (possession for trafficking cannabis) in violation of Section 20-2-80 of the Code of Alabama (1975).

The case was tried to the Circuit Court of Macon County, Alabama, by a jury. The jury found the Defendant guilty of the offense charged in the indictment and after a sentencing hearing, the Court fixed punishment at imprisonment for three years and assessed a fine of Twenty-five Thousand ($25,000.00) Dollars.

Thereafter, appeal was perfected by trial counsel for the Petitioner to the Court of Criminal Appeals of Alabama and that Court entered its opinion affirming the conviction of the Defendant. Application for Rehearing to the Court of Criminal Appeals was overruled on January 1, 1985, the Alabama

Supreme Court denied Your Petitioner's Petition for Writ of Certiorarai in that Court.

This Petition is submitted to review the rulings of the Appellate Courts for the State of Alabama wherein they held that marijuana found growing in an area a distance from Petitioner's trailer of up to 100 yards, without more, properly gave police officers sufficient probable cause to arrest Petitioner. Ruling that the arrest was proper, the Court went further in holding that the observations of a police officer tending to incriminate Petitioner were admissible in Court to substantiate the State's claim that Petitioner was guilty of unlawfully possessing marijuana. These courts also held that Petitioner "voluntarily, intelligently and

understandingly consented to whatever search was made by the officer of the inside of the mobile home".

STATEMENT OF THE FACTS

On July 30, 1982, a narcotics officer of the Alabama Department of Public Safety directed a state trooper in an airplane to a specific area in Macon County, Alabama, for the purpose of scouting the area for marijuana. After spotting a growth of marijuana plants, the aerial trooper directed police officers of the City of Tuskegee, who were travelling in a van near the area, to

some growing plants. Petitioner's home, as well as three other homes, was in the general area of the marijuana. The police officers drove to Petitioner's home at which time Petitioner came out of his mobile home and inquired of the police officers "What's the problem?". He was then placed under arrest. No other people in the area were questioned before Petitioner's arrest. After being placed under arrest, Petitioner requested permission to enter his home to make arrangements for the care of his eight-year-old child at which time the arresting officer informed Petitioner that if he was going inside the trailer, the officer was going inside, also. Petitioner proceeded inside to make provisions for the well-being of his child and the officer did, indeed, follow. It was at this time that the officer

observed what was termed paraphenalia and smelled "a strong aroma of marijuana".

The case proceeded through the trial and appellate court levels of the State of Alabama on the theory that the police officers did not have sufficient probable cause to connect Petitioner with the growing marijuana and that, therefore, suppression of the evidence of the subsequent search of Petitioner's home should have been granted as it was based on an unlawful arrest. The State argued that the evidence should not be suppressed as the search was consented to by Petitioner's need to provide for his minor child, i.e., his entry into the mobile home after the police officer's insistence that he (the police officer) would follow.

In numerous cases, which will be discussed infra, various courts have held

that the mere presence of illegal drugs, in close proximity to a Defendant's home, without further evidence to connect the Defendant to the drugs, is insufficient to support a conviction. Other cases, which will also be discussed infra, have held that mere submission to police authority will not establish consent. The effect of the ruling of the Court in the case sub judice is to grant probable cause where no sufficient probable cause exists, absent evidence acquired from an illegal search. The court justified this ruling on the sole premise that consent was given to a search wherein evidence was acquired giving probable cause for an arrest already, illegally made. It is Petitioner's contention that probable cause cannot be acquired "after the fact" nor can consent voluntarily, intelligently and

understandingly be given when the effect is mere submission to authority.

ARGUMENT

REASONS FOR GRANTING THE WRIT

On behalf of the Petitioner it is submitted to this Honorable Court that the Writ of Ceriorari should be granted to consider the question as to whether or not an illegal arrest and subsequent search and seziure denied Petitioner his right to be free from unreasonable searches and the seizures which right is guaranteed by the Fourth Amendment of the United States Constitution and applicable to the states via the Fourteenth Amendment to said United States Constitution.

With an airplane circling overhead and police cars driving toward his home, Petitioner inquired "What's the problem?" and he was arrested. This was the only evidence brought out in Court concerning the constructive possession by Petitioner of some growing marijuana plants. Petitioner contends that such evidence does not establish a proper foundation to base probable cause to believe Petitioner was the owner of the marijuana plants and, therefore, the proper party to be placed under arrest.

Though this is not the proper forum for airing discrepancies in state court precedent, Petitioner begs the indulgence of the Court to bring to light a case decided by the Court of Criminal Appeals of Alabama with facts startlingly similar to the case at bar. That case, Craft v. State, 439 So. 2d 1323

(Ala. Cr. App., 1983) overturned the conviction of one Craft. Craft was not at home when police officers found 521 growing marijuana plants in a corn field 125-150 feet behind the Defendant's residence. Nevertheless, he was placed under arrest and subsequently convicted. The Criminal Court of Appeals of Alabama overturned his conviction and held that "proximity to illegal drugs or presence on the property where they are located. . . may be sufficient to support a finding of possession when accompanied with testimony connecting the accused with the incriminating surrounding circumstances". However, the State in Craft, as in the case at bar, did not present evidence to establish who owned, possessed or had control over the property in question. The only evidence brought in Court regarding

the ownership of land in the case sub judice was by the Chief of Police of Tuskegee when he stated that he "assumed" the land was private property. In Court, witnesses repeatedly admitted that they had never seen Petitioner in the fields tending the marijuana plants, nor had they seen Petitioner in contact with any marijuana, growing or otherwise. There were no elements of proof of possession, rather such belief as to possession was based on mere speculation.

The Court of Criminal Appeals of Alabama, as well as Federal Circuit Courts, have, prior to the case at bar, consistently held that mere presence of the accused on the premises or simply his proximity to the drugs, does not itself enable a deduction of constructive possession. See U.S. v. Radcliffe, 550 F.2d 431 (9th Cir., 1976);

U.S. v. Laughman, 618 F.2d 1067 (4th Cir., 1980); U.S. v. Philips, 496 F.2d 1395 (5th Cir., 1974), cert. denied, 422 U.S. 1056 (1975); U.S. v. Statten, 581 F.2d 879 (U.S. App. D.C., 1978); Smith v. State, 351 So. 2d 668 (Ala. Cr. App., 1977), cert. denied, Ex Parte Smith, 351 So. 2d 675 (Ala., 1977); Roberts v. State, 349 So. 2d 89 (Ala. Cr. App., 1977), cert. denied, Ex Parte Roberts, 349 So. 2d 94 (Ala. 1977); Cook v. State, 341 So. 2d 183 (Ala. Cr. App., 1977); Garsed v. State, 288 So. 2d 161 (Ala. Cr. App., 1973). Based on the foregoing, it is Petitioner's contention that his arrest was not based on probable cause, and was, therefore, illegal. Inasmuch as the arrest was illegal, the subsequent search, or observations made by police officers inside his home, were also illegal and should have been excluded as

evidence at Petitioner's trial. The trial court's refusal to do so was an error which error was prejudicial to Petitioner's case.

Conflicting testimony was presented on trial as to whether or not Petitioner consented to have the police officer enter his mobile home. Petitioner informed the police officer, following his "arrest", that he had to make provision regarding the care of his eight-year-old child. The officer insisted that if Petitioner was going inside the trailer, the officer would follow whereupon Petitioner had no other recourse but to go inside the trailer to arrange for the care of his child. Police officers on the stand stated that Petitioner gave his consent for the police officer to follow him inside. Petitioner took the stand to refute that he gave consent. The trial court

concluded that consent must have been given since the Petitioner, being under arrest, could not have entered the trailer without an officer. Petitioner strongly contends that mere submission to authority does not give consent and that the trial court erred and the Criminal Court of Appeals concurred the error in such a finding.

Petitioner had no choice but to go inside the house to make arrangements for his child. Were Petitioner to say that the officer could not come in, he contends, the result would have been the same. The burden to prove the free and voluntary giving of consent rests with the state. U.S. v. Smith, 543 F.2d 1141 (5th Cir., 1976). It is Petitioner's contention that the State, in the case sub judice, failed to meet that burden.

Bumper v. North Carolina, 391 U.S. 534 (1968); and Schneckloth v. Bustamonte, 412 U.S. 218 (1973), are icons in the field of voluntariness of consent. This Honorable Court determined that voluntariness was to be determined from the totality of the circumstances. Viewing the totality of the circumstances of this case, there can be no question but that Petitioner was placed in a "no-win" situation: either he could leave with the police officers and, therefore, not make provisions regarding his child, or go inside his home and "allow" the police officer to follow. Such a choice, it is Petitioner's contention, does not make consent voluntary. It was said best by Judge Noylan in an often quoted passage of Whitman v. State, 336 A.2d 515 (Md. Cr. App., 1975):

". . .The lesson articulated by Bumper

> and Schneckloth in the area of search consents is that the individual subjected to the search may indeed be submitting rather than consenting, even in an atmosphere of relative cordiality because of the presence of psychological forces as potent and effectual in achieving a "consent" as the traditional techniques and familiar instruments of physical "persuasion". We must, we find, be guided by the holding in Bumper that a consent which is actually simple acquiesence to lawful authority is not voluntary and, when the defendant is in custody, by the concern expressed in Schneckloth that 'in examining all the surrounding circumstances to determine if in fact the consent to search was coerced, account must be taken of subtly coercive police questions, as well as the possibly vulnerable subjective state of the person who consents. . .'"

Therefore, it is Petitioner's contention that consent to enter his home and search the contents thereof, was not voluntarily given and that the Criminal Court of Appeals of Alabama erred in finding that Petitioner's consent was given voluntarily and freely.

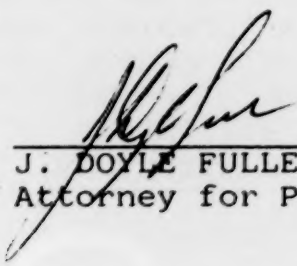
The Petitioner request that this

Honorable Court review the facts of this case to determine if his right to be free from unreasonable searches and seizures as guaranteed by the Fourth Amendment to the United States Constitution and applied to the States via the Fourteenth Amendment was violated. Your Petitioner has exhausted all of his remedial rights in the courts of the State of Alabama and this Court is the proper tribunal for redress of his rights.

CONCLUSION

In conclusion, the Petitioner, George E. Washington, Jr., respectfully submits that the decisions of the Court of Criminal Appeals of Alabama and the Supreme Court of Alabama in this case present conflict with

prior decisions of this Honorable Court, and indeed, with prior decisions of its own court. For this reason, the Petitioner prays that this Honorable Court will issue the Writ of Certiorari and review the decision of the Honorable Court of Criminal Appeals of Alabama and the Supreme Court of Alabama and on such review will reverse the decisions of said courts granting a new trial to the Petitioner.

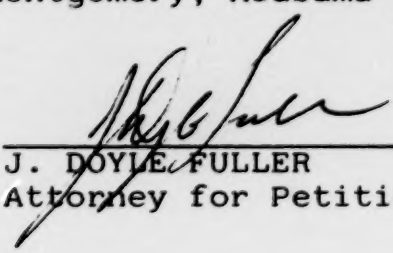


J. DOYLE FULLER
Attorney for Petitioner

CERTIFICATE OF SERVICE

I, J. Doyle Fuller, a member of the Bar of the Supreme Court of the United States and attorney for the Petitioner, George E. Washington, Jr., do hereby certify that on this 20th day of March, 1985, I did serve the requisite number of copies of the foregoing on the attorney for the Respondent by mailing same to him first-class, postage prepaid and addressed as follows:

State of Alabama
Hon. Charles A. Graddick
Attorney General's Office
250 Administrative Building
64 North Union Street
Montgomery, Alabama 36130



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A P P E N D I X "A"

Oct 8 1974

STATE OF ALABAMA - JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1984-85

5 Div. 867

George E. Washington, Jr.

v.

State

Appeal from Macon Circuit Court

CLARK, RETIRED CIRCUIT JUDGE

A jury found this appellant guilty on a trial on an indictment as follows:

"The Grand Jury of said County charge that before the finding of this indictment George E. Washington, Jr.,

alias George Washington, the true or Christian name of whom being otherwise unknown to the Grand Jury, did on to-wit: July 30, 1982, while at or near Midway Road, Midway Community, Tuskegee, Alabama, unlawfully possess for trafficking, 4.76 pounds of cannabis (marijuana), a controlled substance, contrary to and in violation of the provisions of the Alabama Uniform Controlled Substance Act, in violation of Section 20-2-80 of the Code of Alabama; against the peace and dignity of the State of Alabama."

Subsection 20-2-80(1)a of the Code of Alabama 1975, provides:

"Except as authorized in chapter 2, Title 20:

"(1) Any person who knowingly sells, manufactures, delivers, or bring into this state, or who is knowingly in actual or constructive possession of, in excess of one kilo or 2.2 pounds of cannabis is guilty of a felony, which felony shall be known as 'trafficking in cannabis.' If the quantity of cannabis is involved:

"a. Is in excess of one kilo or 2.2 pounds, but less than 2,000 pounds, such person shall be sentenced to a mandatory minimum term of imprisonment of three

calendar years and to pay a fine of $25,000.00."

After a sentencing hearing, the court fixed defendant's punishment at imprisonment for three years and assessed a fine of twenty-five thousand ($25,000.00) dollars.

Three issues are presented in appeallant's brief, which we will now consider in the order of their presentation and under their respective captions set forth in appellant's brief.

I.

"THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS THE STATE'S EVIDENCE."

Prior to the commencement of the trial, the court conducted a hearing on defendant's motion to suppress evidence of what was found by the State growing on land near his trailer home; during the trial of

the case, the court conducted a hearing, out of the presence of the jury, of defendant's motion to suppress evidence as to what was found in the defendant's trailer. Appellant contends that the rulings of the court in overruling defendant's motion or motions to suppress constituted error prejudicial to appellant, which we now consider under separate headings, A and B.

A.

On the first hearing of defendant's motion to suppress, i.e., the motion challenging the evidence as to what was found on the land, two witnesses testified, both on call of the defendant. They were State Trooper David Conrad and Investigator Henry Peavey of the Tuskegee Police Department.

Officer Conrad stated that he had been flying airplanes for the State Trooper's

Office for six or seven years, that on July 30, 1982, he was requested by a narcotics officer of the Alabama Department of Public Safety to check over a "specific geographical area in Macon County, for growing marijuana." After contacting officers of the Tuskegee Police Department, Officer Conrad proceeded from Dothan, Alabama, to the specific area he was to view and while flying at an altitude in excess of five hundred feet he "spotted some marijuana plants growing." He testified further:

> "Q. Could you describe the area in terms of trees, bushes, houses, that you were flying over?
>
> "A. There was a trailer [identified in other evidence as the trailer in which defendant lived], tall trees in the back of it that was surrounding on the north side and the south in the general area. Then to the northwest of the trailer on the other side of the driveway there were some small bushes that had marijuana growing in

it.

"Q. Approximately how large was the clearing that you said this trailer was in?

"A. I couldn't estimate that.

"Q. Small clearing?

"A. A small clearing for the trailer?

"Q. For the trailer?

"A. No, it wasn't really that small.

"Q. Were there a lot of trees next to what you spotted and believed to be marijuana?

"A. It was in the bushes next to the tree line.

"....

"Q. And you say you could spot these marijuana plants and these trees and other vegetation that was green from five hundred feet above the surface of the ground?

"A. That's correct.

"Q. Are there any other people that are employed for the State of Alabama that can so spot marijuana plants growing from five hundred feet?

"A. Not to my knowledge. We are in the process of training some.

"Q. Could you tell me how you train someone to be able to spot green marijuana plants from other green plants?

"MR. JONES [State's attorney]: I object, Your Honor.

"THE COURT: Overruled.

"A. The only way you can really train them is to find the marijuana and show it to them and on a continual basis recognition.

"Q. Isn't it a fact though it's a lot easier to spot marijuana growing in a large field where there are no trees as opposed to a tree-studded area with a lot of growth and vegetation"

"A. Not necessarily."

Investigator Peavey testified that on July 30, 1982, at approximately 2:15 he was in the vicinity of defendant's home and that the following occurred:

"Q. You were out near his [defendant's] property on or right adjacent to his property at the time that you received a call from Mr.

Conrad that he saw marijuana?

"A. In the vicinity, yes.

"Q. You were adjacent to his property? You were right near his property when Mr. Conrad first heard or told you that there was marijuana growing?

"A. That is correct.

"Q. So you knew where it was prior to Mr. Conrad telling you?

"A. No, I did not.

"Q. You just indicated that you were right near his property?

"A. That's right. But I didn't say anything about I knew it was there.

"Q. Why did you go specifically to Mr. Washington's property then?

"A. Because when Officer Conrad spotted the plants he advised me where they were.

"....

"Q. How far from the main road-no, back up. Could you tell the Court where Mr. Washington's property is located in Macon County? Just roughly tell the Court.

"A. It's located in the Midway Community.

"Q. Off what county highway is that located?

"A. That's off the old V.A. Road in that area.

"Q. And that is a paved county road?

"A. That's correct.

"Q. How far off the paved county road is Mr. Washington's property located?

"A. How far is it? I would say approximately a mile. That's my guess, I'm not sure.

"Q. So you were on that-you had taken the county road, the paved county road. You had gone down the dirt road and you were right next to Mr. Washington's property prior to Mr. Conrad telling you that marijuana was spotted?

"A. That's correct.

"Q. So you had specifically gone directly to Mr. Washington's property?

"A. No, I had not gone directly to Mr. Washington's property.

"MR. BULLS [Defendant's trial attorney]: Your Honor, we don't have

any further questions.

"CROSS-EXAMINATION

"BY MR. JONES:

"Q. Detective Peavey, when you were directed to the location of the marijuana plants that were growing, where specifically in relationship to the trailer was the plants growing?

"A. About seventy-five to a hundred yards to the right of the trailer.

"Q. Did you have occasion to do anything with those plants?

"A. Yes.

"Q. What did you do with those plants?

"A. We pulled them up.

"Q. How many plants were there?

"A. Twenty-seven.

"Q. Twenty-seven?

"A. That's right.

"Q. Was there any obstruction to your view of the plants as you followed the directions of ABI Agent Conrad?

"A. No, they were in plain view.

"MR. JONES: That's all, Judge.

"REDIRECT EXAMINATION

"BY MR. BULLS:

"Q. You saw those plants prior to Mr. Conrad telling you where they were, didn't you, Detective Peavey?

"A. Officer Conrad advised me to look to my right. I looked to my right and they were in plain view.

"Q. You say they were seventy-five to a hundred yards from where his trailer was located?

"A. Approximately.

"Q. Were there any other houses around that area?

"A. Not in that particular area. There were some further up the street.

"Q. When you say further up the street you are talking about a hundred yards up the street?

"A. In my judgment, further than that.

"Q. A hundred and fifty yards? About the same distance as they were from Mr. Washington's trailer?

"A. No, sir.

"MR. BULLS: No further questions.

"RE-CROSS EXAMINATION

"BY MR. JONES:

"Q. Were there any other houses or trailers in the clear area where the plants and defendant's trailer was located?

"A. Were there any other houses?

"Q. Yes, sir. Or trailers in the cleared area where the defendant's trailer was located?

"A. No, sir, not to my knowledge."

Defendant also testified at the hearing of the motion to suppress. He said that he was at his "mobile home about a half a mile off of the Midway Road" on July 30, 1982, that his "little boy" nearly nine years of age was with him and that "approximately 2:30, 2:45 police officers came to his home," and he was thereafter arrested by them. He said:

"Q. At what point were you placed under arrest?

"A. Well, after they had pulled the plants and put them in the truck and that would have been maybe 45 minutes to an hour after they had been there. First, I was arrested by Detective Kindell."

The defendant further testified on the hearing of the motion to suppress that he was placed under arrest "approximately fifteen to twenty minutes after they got out there."

The specific issue now under consideration is whether the evidence as to the possession of marijuana by defendant was obtained in contravention of the "right of the people to be secure in their persons, houses, papers, and effect, against unreasonable searches and seizures," provided by the Fourth Amendment to the Constitution of the United States. No warrant for the search of defendant's property or the seizure

of the marijuana involved was issued. Attorneys for each of the parties have cited numerous authorities on the subject. They have apparently narrowed the area of disagreement between them to whether the evidence sought to be suppressed was in open view of those who obtained it, which would place it within one of the few well-recognized exceptions to the principle that the evidence would not be admissible if obtained without the issuance of a valid warrant therefor. It was held in Harris v. United States, 39 U.S. 234, 236, 88 S.Ct. 992, 19 L.Ed.2d 106 (1968):

> "... It has long been settled that objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence. Kerr v. California, 374 U.S. 23, 42-43, 10 L.Ed.2d 726, 743, 83 S.Ct. 1623 (1963); United States v. Lee, 274 U.S.

539, 71 L.Ed.2d 1202, 47 S.Ct. 746 (1927); Hester v. United States, 265 U.S. 57, 68 L.Ed. 398, 45 S.Ct. 445 (1924)."

In pressing his contention that the evidence under consideration does not come within the "plain view" exception, appellant contends "the police officer must discover incriminating evidence 'inadvertently' under the plain view doctrine." Whatever comfort appellant obtains out of the large number of cases in which it is indicated that the "open view" exception does not apply unless the evidence is observed "inadvertently," he does not convince us that the evidence was not admissible in the instant case, in which there was no instrusion whatever upon the property of defendant by either of the officers at the time they observed the marijuana in plain view. Officer Conrad, while flying at an altitude in excess of 500

feet over defendant's property, was not violating any right of defendant, and in going down the dirt road next to defendant's property, Officer Peavey was not violating any legal duty he owed the defendant. To say, under such circumstances, that evidence of what they found must have been inadvertently found by them would constitute a semantic puzzle but would not constitute a logical conclusion, we think. The trial court was not in error in overruling the phase of defendant's motion to suppress the evidence as to the marijuana found growing upon defendant's land.

B.

We now consider the ruling of the court overruling defendant's motion to suppress the evidence as to what was heard, felt, seen, smelled or tasted by the officers

in the mobile home of defendant on the afternoon of July 30, 1982. At the hearing as to such proposed evidence, Officer Darrell Persons, of the Tuskegee Police Department, testified that as he went to defendant's mobile home the following occurred:

> "A. Then he came out. And we explained to him why we were out there.
>
> "Q. What did you do to him, if anything?
>
> "....
>
> "Q. What, if anything else, was said or done at that point?
>
> "A. He advised that he had to go back to the trailer.
>
> "Q. Then what happened or what was said?
>
> "A. I asked him did he object to me going back in there with him.
>
> "Q. What did he say?
>
> "A. He said no.

"Q. Then what happened?

"A. We went inside. He gave some keys to another gentlemen that was inside.

"Q. Did that gentlemen leave?

"A. Yes, he did.

"Q. Did the kid leave?

"A. Yes.

"Q. While in the house, what, if anything, did you observe?

"A. I observed-well, I smelled a strong aroma of marijuana.

"....

"Q. What, if anything else, did you observe other than the strong aroma of marijuana?

"A. Plastic bags, rolling paper, other paraphernalia.

"Q. What other paraphernalia specifically did you observe?

"A. Things that you weigh, a weighing tray.

"Q. Scales?

"A. Scales.

"Q. At some point after that did you and the defendant exit the house?

"A. Yes, we did.

"Q. Was the door locked?

"A. I didn't know at the time whether or not it was locked or not.

"Q. Did you find out later that it had been locked?

"A. Yes.

"Q. By whom?

"A. By the defendant.

"Q. When?

"A. When we exited out. We came out."

The defendant took the stand on the hearing on the motion to suppress the evidence found in the trailer. He denied that he gave his consent to the entry of the trailer by any of the officers. At the conclusion of the hearing of the phase of the motion to suppress the evidence as to what was observed

in the trailer, the court ruled as follows:

> "THE COURT: The ruling is that all of the testimony relating to Officer Person's initial visit inside the trailer is admissible. None of the testimony concerning the subsequent thing after the man had locked the door is admissible."

We are not persuaded that the trial court was in error in concluding that defendant voluntarily, intelligently and understandingly consented to whatever search was made by the officer of the inside of the mobile home.

II.

"THERE WAS NO EVIDENCE TO CONNECT THE APPELLANT WITH THE GROWING OF MARIJUANA, THEREBY EVIDENCING THAT APPELLANT'S MOTION TO EXCLUDE THE STATE'S EVIDENCE WAS CORRECTLY DENIED."

The witnesses David Conrad, Henry Peavey and Darrell Persons testified on the trial of the case. Their testimony included

testimony that was substantially the same as their testimony on the hearing of the motion to suppress. A repetition thereof would serve no useful purpose. A portion of the testimony of Officer Conrad on the trial of the case was as follows:

> "Q. Did you also on that date observe any type of housing facility in or about the area of the plants you observed?
>
> "A. There was a house trailer approximately a hundred feet or so from the plants.
>
> "Q. Now, the marijuana plants that you observed on July 30th, 1982, would you describe their location in regard to the surrounding area?
>
> "A. There was a cleared out area where the trailer was sitting. And just as you're facing the trailer-I believe it's facing to the west, to your right there was some-like it had been pulpwood and brush growing up about four or five feet tall. The plants were among the brush.
>
> "Q. The plants were among the brush?

"A. Yes.

Officer Peavey testified on the trial in part as follows:

"Q. Now, let's talk about the area that you were in at that time. Describe the road that you were on Detective Peavey?

"A. Okay. It was a dirt road that dead ended at the trailer.

"Q. And do you know who lived in the trailer at that time?

"A. Yes, sir, I do.

"Q. And who is that?

"A. Mr. Washington [whom he identified as the defendant in the case].

"....

"A. At this time, I looked to the left. The trailer was sitting to the left of the plants. Mr. Washington came out of the trailer. He looked to the left. The plane was flying over to the left. He looked to the left. After looking to the left, he looked directly in the area where the plants were which was to the right.

"Q. How large an area is this you are

talking about, Detective Peavey? Is it a large clearing or a small clearing?

"A. The plants.

"Q. The entire area there, the clearing?

"A. Medium size area.

"Q. Now, were there any other houses in the cleared area?

"A. No, sir, there weren't.

"Q. Was there any trailers?

"A. No. sir.

"....

"Q. In your judgment, how many feet away from the dirt road that led to the cleared area were the plants?

"A. From the dirt road?

"A. From the dirt road the plants were probably ten to fifteen feet.

"Q. Now, from the trailer to the plants would be approximately how many feet?

"A. Approximately seventy-five feet to a hundred feet"

Officer Persons testified on the trial in

part as follows:

"Q. How far is it from the trailer to where the plants were growing?

"A. I would say about 75 to 100 feet.

"Q. Okay. Now, what did you do as you went down to the trailer where the defendant was located?

"A. As we went down and parked the vehicle and got out the defendant came outside and asked--

"Q. Outside of the trailer?

"A. Outside of the trailer.

"Q. Completely outside?

"A. Completely outside and shut the door behind him.

"Q. Then what happened?

"A. Then he said what's the problem?

"Q. All right. Then what happened?

"A. And then he was placed under arrest."

The undisputed evidence shows, and there is no contention to the contrary, that the plants taken from that part of the land

described were turned over to a chemistry coordinator of the Alabama Department of Forensic Science, who testified:

> "My examination revealed that the plant material was marijuana; genus in species cannabis sativa L. And the weight of the material was 2,161.5 grams which is 4.76 pounds.
>
> "....
>
> "Q. Okay. So when we talk about 4.76 pounds, we are only talking about the weight of the leaves and not the weight of the stalks?
>
> "A. Yes, sir, that's correct."

Appellant is correct in his contention that upon consideration by the trial court of a motion to exclude the evidence interposed by defendant at the close of the state's case and before defendant had presented any evidence, the trial court was "limited to consideration of evidence which was before it at the time the motion was made. Crafts v. State, Ala. Cr. App., 439

So. 2d 1323, 1324, cert. denied, (1983), furnishes solid support for the contention. Appellant relies on Crafts also for his further contention that the trial court was in error in overruling his motion to exclude, for the reason urged by him that there was no substantial evidence at that time that the marijuana seized by the officers and repeatedly referred to in the evidence was in his actual or constructive possession. The similarity between some of the evidence in Crafts and the evidence in the instant case furnishes a reasonable basis for the contention. In other material respects, the facts in the instant case are distinguishable from those in Crafts. In Crafts, the defendant was not at home at the time of the seizure; in this case, the defendant was at home and manifested concern as to what the

officers were doing with or to the marijuana, by leaving the door of his mobile home and asking the officers, "What's the problem?" In the transcript are photographs in evidence of the growing marijuana, the mobile home and its location relative to some of the growing marijuana, some of the marijuana that had been seized, the height and density of the growth of marijuana and the location in the road where Officer Peavey was standing or walking when he first observed the marijuana, which serve as strong pictorial evidence to the effect that an adult who had been living for some time in the trailer as his own home would have known that it was marijuana. When these facts are taken into consideration in connection with other circumstances shown, including particularly the existence in the mobile home of "a strong aroma of marijuana"

of "plastic bags, rolling papers, other paraphernalia," including a "weighing tray," we must conclude that the State produced substantial evidence of defendant's guilt of unlawfully possessing for trafficking 4.76 pounds of marijuana, and that the trial court was not in error in overruling defendant's motion to exclude the State's evidence.

III.

"WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DENYING APPELLANT'S MOTION FOR A NEW TRIAL AS AMENDED?"

Appellant's argument in support of this issue is tripartite. In the first part, appellant argues that the motion for a new trial "for the most part, was based on matters constituting reversible error discussed in arguments I and II," which we have already considered and determined

adversely to appellant.

In the second part of his brief as to this issue, appellant argues that the judgment of sentence was not in conformity with the verdict of the jury and the judgment of conviction. The verdict of the jury was: "We, the jury find the defendant guilty of unlawfully possessing for trafficking in cannabis (marijuana)." Appellant argues that, in conformity with the verdict and the judgment of conviction, the appellant "could have been sentenced under the Code of Alabama 1975, Section 20-2-70, which doesn't carry a mandatory fine of $25,000.00 and he would have been eligible for probation." We disagree. As noted at the commencement of this opinion , the indictment was for a violation of Section 20-2-80 of the Code and specifically charged that defendant

"unlawfully possessed for trafficking 4.76 pounds of cannabis (marijuana)." The crime charged, as it relates to marijuana, is in some respects similar to the crime charged by Section 20-2-70, but it is not the same. We disagree with appellant's contention in this respect and specifically with his contention that, "the amount of marijuana involved in this case was a fact question that should have been determined by the jury." The undisputed evidence showed that the marijuana involved was "in excess of 2.2 pounds but less than 2,000 pounds," for which Section 20-2-80(1)(a) prescribes "a mandatory minimum term of imprisonment of three calendar years" and "a fine of $25,000.00."

By the third part of appellant's argument under Issue III, he challenges the constitutionality of Section 20-2-80 by

urging that it prescribes cruel and unusual punishment. The same contention was determined adversely to appellant in Wheatt v. State, per Judge Bowen, now Presiding Judge, Ala. Cr. App., 410 So. 2d 479, 482-483 (1982).

The judgment of the trial court should be affirmed.

The foregoing opinion was prepared by Retired Circuit Judge Leigh M. Clark, serving as a judge of this Court under the provisions of Section 6.10 of the Judicial Article (Constitutional Amendment No. 328); his opinion is hereby adopted as that of the Court.

AFFIRMED.

All the judges concur.

THE STATE OF ALABAMA — JUDICIAL DEPARTMENT

IN THE SUPREME COURT OF ALABAMA

January 25, 1985

84-224

EX PARTE: GEORGE E. WASHINGTON

PETITION FOR WRIT OF CERTIORARI

(Re: George E. Washington v. State)

CRIMINAL APPEALS 5/867

CERTIFICATE OF JUDGMENT
WRIT DENIED

The above cause having been duly submitted, IT IS CONSIDERED AND ORDERED that the petition for writ of certiorari be denied.

Costs taxed to petitioner.

MADDOX, J. - TORBERT, CJ., JONES, SHORES & BEATTY, JJ., CONCUR.

I, Robert G. Esdale, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.

Witness my hand this 25 day of Jan 19 85.

Robert G. Esdale

Clerk, Supreme Court of Alabama

THE ALABAMA COURT OF CRIMINAL APPEALS
Montgomery, Alabama

Dear Sir: OCT 23 1984

Your APPLICATION FOR REHEARING received and filed in the appeal of:

5 Div. 867 George E. Washington
Appellant
v.
The State of Alabama
Appellee

Yours very truly,
MOLLIE JORDAN, CLERK

J. DOYLE FULLER

Nov. 13, 1984 overruled.